



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kim's General Maintenance, Inc.

File: B-275823

Date: April 3, 1997

James F. Nagle, Esq., Oles Morrison & Rinker, LLP, for the protester.

Mark A. Rowland, Esq., McKenna & Cuneo, L.L.P, for Patriot Maintenance, Inc., an intervenor.

Dennis D. Carpenter, Jr., Esq., Department of the Air Force, for the agency.

Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid that omits standard form 1447, "Solicitation/Contract," which contains the bid acceptance period provision, is nonresponsive where the bid does not otherwise unambiguously indicate agreement to the minimum required bid acceptance period.

DECISION

Kim's General Maintenance, Inc. protests the rejection of its bid under invitation for bids (IFB) No. F65503-96-B0012, issued by the Department of the Air Force for maintenance of Military Family Housing at Eielson Air Force Base, Alaska. The agency rejected Kim's low bid as nonresponsive because Kim's failed to execute and return with its bid standard form (SF) 1447, "Solicitation/Award" (the cover sheet of the IFB), which contains material provisions, or to otherwise incorporate these provisions in its bid. Kim's asserts that its agreement to all material requirements may be inferred by other references in its bid.

We deny the protest.

In its initial protest submission, the protester contended that it executed the SF-1447 and included it in its bid package, which it submitted to the Air Force by the November 12, 1996, amended bid opening date. The protester included statements from its general manager and another employee certifying that a copy of the SF-1447 was included in the bid package. Another of Kim's employees submitted a certified statement that he attended the bid opening and that the Air Force personnel did not note any irregularities with respect to Kim's bid.

In response, the agency submitted affidavits from three Air Force officials and from a bidder's representative, all of whom were present at the bid opening. The agency officials state that the absence of the SF-1447 from the protester's bid package was immediately noted, and that they checked and rechecked the bid package and confirmed that the SF-1447 was missing. These officials and the other bidder's representative also state that it was announced at the bid opening that Kim's SF-1447 appeared to be missing.

During the subsequent verification of the bids, the agency determined that Kim's had submitted the lowest bid but that Kim's bid package did not contain any SF-1447. Consequently, on December 17, 1996, Kim's was notified that its bid was rejected as nonresponsive because the bidder did not expressly bind itself to comply with the material terms and conditions of the solicitation contained in the SF-1447.

In response to the agency's report, the protester no longer maintains that it included the SF-1447 in its bid package, and instead contends that the material provisions set forth in the SF-1447 are incorporated by reference in other sections of its bid.

Where a bidder fails to return with its bid all of the documents which were part of the IFB, the bid must be submitted in such a form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all the material terms and conditions of the IFB. Weber Constr., B-233848, Mar. 27, 1989, 89-1 CPD ¶ 309; Jones Floor Covering, Inc., B-213565, Mar. 16, 1984, 84-1 CPD ¶ 319; Union City Plumbing, B-208500, June 7, 1983, 83-1 CPD ¶ 614. The minimum acceptance period called for in a solicitation is one of the material requirements to which a bidder must agree in order for its bid to be responsive. See Elevator Control Serv., Elcon Enters., Inc., B-239360, June 6, 1990, 90-1 CPD ¶ 534. If a bidder incorporates by reference the material provisions of the missing pages of the solicitation in the documents that it does submit, this may be sufficient to bind the bidder to those material provisions and make its bid responsive. See International Signal & Control Corp.; Stewart Warner Corp., 55 Comp. Gen. 894 (1976), 76-1 CPD ¶ 180.

The SF-1447, omitted from Kim's bid, contains, among other things, a provision which sets forth the bidder's agreement that it will hold its bid open for a bid acceptance period of 120 days unless the bidder inserts a different period. This 120-day bid acceptance period is not specifically contained in other documents submitted by Kim's with its bid.

The protester argues that it is incorporated by reference elsewhere in its bid. The protester maintains that by returning section K of the IFB it referenced the minimum acceptance period in its bid sufficiently to constitute an agreement to be bound as required. We disagree. The 120-day bid acceptance period is found only

in block 11 of the SF-1447; section K does not set forth the required minimum acceptance period of 120 days. Section K-20, titled "Minimum Bid Acceptance Period", at paragraph (c) reads as follows: "[t]he Government requires a minimum acceptance period of (as set forth on Standard Form 1447, Block 11) calendar days." Paragraph (d) of the section goes on to state that where a bidder elects to provide a longer bid acceptance period, it may do so by inserting that period on block 11 of the SF-1447. Paragraph (e) cautions that a bid allowing less than the government's minimum acceptance period will be rejected.

In order to be found responsive, an incomplete bid must unambiguously incorporate by reference all the material terms and conditions of the invitation. International Harvester Co., B-192996, 79-1 CPD ¶ 259; Armada, Inc., B-189409, 78-1 CPD ¶ 157. Here, the incorporated document does not clearly set forth the necessary material term because Block 11 of the SF-1447 permits and invites bidders to offer alternate acceptance periods. While the missing SF-1447 contains the 120-day bid acceptance period, it also contains a blank space for the bidder to enter a different period. Since the SF-1447 was not included with the protester's bid, there is simply no way the agency can verify whether Kim's took exception to the 120-day minimum acceptance period. In short, the putative incorporation fails to unambiguously incorporate agreement to the missing and material required bid acceptance period. Because Kim's bid gives the protester the choice to declare or deny compliance with the bid acceptance period, accepting the bid would provide Kim's with an improper opportunity to decide after bid opening whether or not to make its bid responsive. Larry's Inc., B-230822, June 22, 1988, 88-1 CPD ¶ 599.

The protester maintains that its position here is similar to that of the bidder in Isometrics, Inc., B-241333, Oct. 30, 1990, 90-2 CPD 352. In Isometrics, the bidder failed to include section K, which contained a "Minimum Bid Acceptance Period" clause setting the acceptance period at 60 days. However, the bidder did include the SF-33 cover sheet, which also specified a 60-day bid acceptance period, as a result of which the bid was properly deemed to be responsive. Here, the section K clause included in the bid did not contain or incorporate the 120-day minimum bid acceptance period found on the missing SF-1447.¹

¹Kim's also cites our decision in M.R. Dillard Constr., B-271518.2, June 28, 1996, 96-2 CPD ¶ 154, in which we held that acknowledging an amended version of the SF-1442 containing the same material provisions as the omitted SF-1442 was sufficient to make responsive a bid which did not include the back page of the original SF-1442 which included the bid acceptance period provision. However, in Dillard the bidder's acknowledgment of the amended SF-1442 bound it to offer the required bid acceptance period, while in the present case there is no such acknowledgment and nothing else which binds the bidder to the required minimum bid acceptance period.

Kim's also attempts to distinguish this case from others, such as Weber Constr., supra, where bidders who failed to submit a SF-1442 were rejected as nonresponsive, on the basis that the SF-1442 is a more detailed form and has more material provisions than the SF-1447. These cases cannot be distinguished for that reason; notwithstanding any differences in the forms, the material terms at issue are substantively the same and the consequence for not complying with them is the same.

In short, without the missing SF-1447, the bid simply did not demonstrate its agreement to be bound by the 120-day minimum bid acceptance period. Accordingly, Kim's bid was properly rejected as nonresponsive.

The protest is denied.

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